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Bad Children or a Bad System: Problems in Federal Interpretation of a Delinquent's Prior Record in Determining the Appropriateness of a Discretionary Judicial Waiver

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Notes

BAD CHILDREN OR A BAD SYSTEM: PROBLEMS IN FEDERAL INTERPRETATION OF A DELINQUENT'S PRIOR RECORD IN DETERMINING THE APPROPRIATENESS OF A DISCRETIONARY JUDICIAL WAIVER

I. INTRODUCTION

Two children, both fifteen years old, are charged with a crime. One child is tried as a juvenile and receives a five-year sentence in a juvenile facility that has extensive rehabilitation and counseling programs.[1] The other child, tried as an adult on the same charge, is sentenced to serve fifteen years in prison and forever branded with the stigma of being a convicted felon.[2] Seem fair? Hardly. Nevertheless, as the federal system currently stands, two juveniles with similar records and backgrounds, fac-

1. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Correction/Detention* (Nov. 21, 2004), *available at* http://ojjdp.ncjrs.org/search/TopicList.asp (listing available rehabilitation and counseling programs in juvenile justice system); *see also* ROBERT D. HOGE, THE JUVENILE OFFENDER: THEORY, RESEARCH AND APPLICATIONS 200–22, 226–52 (2001) (detailing various treatment strategies used for juvenile rehabilitation); Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System,* 27 CRIME & JUST. 81, 139–41, 142–43 (2000) (detailing differences between juvenile and adult institutions including staff sizes, educational programs, facility organization and inmates' own perceptions and attitudes towards being treated in adult or juvenile facility). These strategies address social, emotional and behavioral problems that underlie delinquent behavior in the hopes of successfully rehabilitating a child. *See* HOGE, *supra,* at 222–23 (summarizing available judicial sanctions for juvenile offenders).

2. *See* Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court,* 30 HARV. C.R.-C.L. L. REV. 507, 529 (1995) (noting that juveniles in adult prison are not rehabilitated, but often develop into "career criminals"). *See generally* Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice,* 35 AM. CRIM. L. REV. 371 (1998) (examining types of transfers and ramifications of transfer in states' juvenile justice systems). The commentator asserts that transfer is the wrong solution for juvenile crime because it fails to achieve any of the goals that justify its existence. *See id.* at 401 (stating transfers are "merely a quick fix" to juvenile crime and not real solution). Transfer, in the commentator's view, may be the wrong solution because of the failure to swiftly sanction juveniles after they commit a crime, the high rate of recidivism among juveniles who were transferred, the loss of rehabilitative opportunities and the effects of being incarcerated with adults. *See id.* at 402–05 (elaborating on why transfer is wrong solution to juvenile crime); *see also* JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS 127–216 (1998) (discussing impact that interaction with law may have on juvenile's life).

ing similar charges, may be tried differently because of problems with discretionary waivers between juvenile and criminal courts.[3]

Why does this happen? Because of a discrepancy in the interpretation of waiver factors under the Federal Juvenile Delinquency Act (FJDA),[4] juveniles facing a discretionary judicial waiver are receiving differential treatment from district court judges.[5] A juvenile entering the federal system faces several procedural possibilities: automatic transfer to criminal court by statute, adjudication in the juvenile justice system or discretionary judicial waiver to criminal court, resulting in the youth being tried as an adult.[6] In the third scenario, a significant problem arises because judges have the exclusive authority to send a juvenile to the criminal system based on six subjective factors.[7] The larger issue, however, is that the meaning of one of these six factors—"prior delinquency record"—is

3. *See generally* Bradley T. Smith, Comment, *Interpreting "Prior Record" Under the Federal Juvenile Delinquency Act*, 67 U. CHI. L. REV. 1431 (2000) (examining federal approach to juvenile waivers and ultimately supporting broad interpretation of "prior delinquency record"); Randie P. Ullman, Note, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329 (2000) (examining federal approach to juvenile waivers and ultimately deciding that increasing subjectivity of waiver decision is best solution). Both of these articles examine the same problem addressed in this Note, but reach a different conclusion. *Compare* Smith, *supra*, at 1460 (concluding that expansive interpretation of "prior delinquency record" is proper), *with* Ullman, *supra*, at 1368 (concluding that all prior police contact should be considered). Although a uniform solution is not agreed upon, all of these articles call for a reform of the current discretionary waiver process as a way of increasing the effectiveness of the federal juvenile justice system. *See* Smith, *supra*, at 1460 (concluding certain conduct should be excluded for waiver purposes even though currently admissible); Ullman, *supra*, at 1368 (urging federal courts to adopt uniform definition of "prior delinquency record" for increased effectiveness).

4. *See* 18 U.S.C. § 5032 (2004) (establishing waiver factors for juveniles under federal jurisdiction).

5. 5. *See* Guttman, *supra* note 2, at 534–41 (using state waiver examples to illustrate possible reasons for differential treatment including judicial interpretational problems with statutes, racial biases, misuse of psychological evaluations and failure to listen to youthful offender). For a further discussion of the differential treatment juveniles are receiving under the Federal Juvenile Delinquency Act (FJDA), see *infra* notes 124–64 and accompanying text.

6. *See* 18 U.S.C. § 5032 (enumerating possibilities for where juvenile will face charges).

7. *See id.* (elaborating on discretionary power district court judges hold during waiver hearings due to findings made "in the interest of justice"). The six statutory factors that a judge considers for the purpose of a discretionary waiver under the FJDA are:

> [1] the age and social background of the juvenile; [2] the nature of the alleged offense; [3] the extent and nature of the juvenile's prior delinquency record; [4] the juvenile's present intellectual development and psychological maturity; [5] the nature of past treatment efforts and the juvenile's response to such efforts; [6] the availability of programs designed to treat the juvenile's behavioral problems.

Id.

unclear.[8] Judges assess a juvenile's "prior delinquency record" when making discretionary waiver decisions.[9] Nonetheless, no uniform interpretation of this factor exists.[10] Consequently, the lack of judicial uniformity in applying the waiver factors often results in wide variations in the outcomes of waiver hearings.[11] The resulting impact of this judicial discretionary waiver has a staggering effect on a juvenile's life; therefore, an accurate, uniform and consistent interpretation of the FJDA discretionary waiver factors is of critical importance.[12]

This Note examines the circuit split over the interpretation of federal discretionary judicial waiver factors, specifically analyzing the various interpretations of "prior delinquency record."[13] Part II explores the origins of the juvenile justice system through historical, judicial and legislative background.[14] Part III examines the mechanisms for juvenile waiver in the federal court system.[15] Part IV analyzes the circuit split assessing "prior delinquency record" for discretionary waiver purposes.[16] Part V argues that narrowly construing the meaning of "prior delinquency record" is the

8. *See* United States v. Juvenile Male, 336 F.3d 1107, 1111 (9th Cir. 2003) (noting current circuit split as to what constitutes juvenile's "prior delinquency record"), *overruled by* United States v. Doe, 366 F.3d 1069, 1078 (9th Cir. 2004) (overruling *Juvenile Male* on question other than meaning of "prior delinquency record"). On appeal from a district court order to transfer to adult status, the defendant argued that the district court abused its discretion by considering unadjudicated arrests as part of his "prior delinquency record" for waiver purposes. *See id.* at 1111 (elaborating on defendant's claims). In reversing the decision on other grounds, the court noted the circuit split on the issue of whether to consider unadjudicated charges as part of a juvenile's delinquency record, but did not weigh in on the issue. *See id.* at 1112 (stating reluctance of court to address issue without possessing juvenile's record). *See generally* Smith, *supra* note 3 (examining lack of clarity in FJDA discretionary waiver factors); Ullman, *supra* note 3 (same).

9. *See* 18 U.S.C. § 5032 (listing six statutory factors judges use to determine whether discretionary judicial waiver to criminal system is appropriate). For a further discussion of the six statutory factors, see *supra* note 7 and accompanying text.

10. For a further discussion of the lack of uniformity in interpretation, see *infra* notes 124–203 and accompanying text.

11. For a further discussion of the circuit split and lack of uniformity in the application of discretionary judicial waiver, see *infra* notes 124–64 and accompanying text.

12. *See generally* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (1999) [hereinafter REPORT] (providing general statistical evidence of juveniles involved with crime and resulting impact on their lives). For a further discussion on the potential impact that waiver may have on the quality of a juvenile's life, see *infra* notes 109–16 and accompanying text.

13. For a further discussion of the circuit split over the meaning of "prior delinquency record," see *infra* notes 124–64 and accompanying text.

14. For a further discussion of the historical, judicial and legislative background of the juvenile justice system, see *infra* notes 19–95 and accompanying text.

15. For a further discussion of the FJDA and an explanation of the mechanics of the waiver process in the federal system, see *infra* notes 96–123 and accompanying text.

16. For a further discussion of the circuit split, see *infra* notes 124–64 and accompanying text.

most practical and constitutionally sound interpretation.[17] Finally, Part VI asserts that Congress needs to further define the discretionary waiver factors so that judges will apply a uniform federal standard, thereby maintaining the integrity of the juvenile justice system.[18]

II. BACKGROUND

To fully grasp the potential impact of the FJDA on present and future cases, one must first understand how and why a separate juvenile justice system developed.[19] This part of the Note explains the emergence of the separate juvenile justice system, the major United States Supreme Court cases that shaped juvenile justice and relevant federal juvenile justice legislation.[20]

A. *Emergence of a Separate Juvenile Justice System*

Juveniles were not always viewed as requiring special attention and care in the criminal justice system.[21] Until the nineteenth century, the American legal system treated juvenile offenders the same way as hardened adult criminals.[22] In fact, in the late eighteenth century, children as young as seven years old could face trial in criminal court, receive the same punishments as adults, including the possibility of a death sentence, and serve time in the same prisons as adults.[23]

Changing social climates in the nineteenth century, however, fueled a metamorphism of the criminal system.[24] Rapid industrialization, modernization and urbanization produced massive social upheaval and change in the American social structure.[25] Cities were viewed as criminal breeding

17. For a further discussion on the merits of using a narrow interpretation, see *infra* notes 165–203 and accompanying text.

18. For a further discussion of policy considerations and the need for further legislative guidance, see *infra* notes 204–14 and accompanying text.

19. For a further discussion of why a separate juvenile justice system developed, see *infra* notes 21–47 and accompanying text.

20. For a further discussion of the history of the juvenile justice system, juvenile case law and related federal legislation, see *infra* notes 21–95 and accompanying text.

21. 21. *See* WATKINS, *supra* note 2, at 3–4 (discussing early treatment of adolescents and their relationship to legal system).

22. *See* MARGARET C. JASPER, JUVENILE JUSTICE AND CHILDREN'S LAW 1–3 (2001) (discussing English roots of juvenile justice system); *see also* Ullman, *supra* note 3, at 1331 (discussing early nineteenth century treatment of juveniles). Because the juvenile and adult populations were not segregated in prison, juveniles were housed with older and more seasoned adult criminals. *See* Ullman, *supra* note 3, at 1331 (noting juvenile prison conditions).

23. *See* REPORT, *supra* note 12, at 86 (discussing legal conditions for children in early America). Children as young as seven who committed crimes were thought to possess a criminal mind. *See id.* (noting belief that children older than seven were presumed capable of criminal intent).

24. *See id.* at 86–92 (providing overview of history of juvenile justice system).

25. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 474

grounds.[26] As a result, this turbulent social climate spawned the Progressive movement, which attempted to combat the many problems accompanying modernization.[27]

The Progressive movement viewed children as innocent and corruptible beings who simply required guidance and care to develop properly.[28] Furthermore, reformers viewed children as products of their environments.[29] Because Progressives believed that environmental factors were instrumental in creating either criminals or model citizens, they reasoned that juvenile crime could be controlled if children had stability in their homes.[30]

Reforming the juvenile justice system to provide adolescents with special care became one of the Progressives' earliest social reforms.[31] Understanding that the existing juvenile justice system did not solve the problems of juvenile crime, these reformers pushed for the development of a flexible system that embodied the concept of the state exercising guardianship over troubled children.[32] The idea of the state acting as guardian is referred to as *parens patriae*, the government assumes the role of the juvenile's guardian to ensure the child's best interests are protected.[33]

(1987) (noting that modernization created new concept of family and childhood). *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 28–60 (1969) (detailing historical development of separate juvenile justice system through evaluation of social, legal and economic reforms).

26. *See* PLATT, *supra* note 25, at 36 (noting nineteenth century perception that city environment turned children into criminals).

27. *See* Klein, *supra* note 2, at 375–77 (describing Progressive movement's philosophy and drive to reform juvenile justice system). *See generally* PLATT, *supra* note 25 (detailing development of Progressive movement).

28. *See* PLATT, *supra* note 25, at 36–43 (discussing philosophy of Progressive movement and resulting impact philosophy had on development of their juvenile justice ideals); *see also* Feld, *supra* note 25, at 473–79 (giving detailed historical background of Progressive movement).

29. *See* PLATT, *supra* note 25, at 43–44 (summarizing important developments in ideology relating to criminals). Some of the important developments towards the end of the century included the birth of the idea that delinquency was of a temporary and reversible nature if properly treated. *See id.* at 45 (summarizing beliefs of reformers). During this same time period, professional penal institutes emerged. *See id.* at 44 (noting rise of professional class of penal administrators).

30. *See id.* at 43 (discussing Progressive ideology and beliefs about criminals being "made" as opposed to born).

31. *See* BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 8–17 (1993) (providing detailed history of Progressives' philosophy and justice reformation goals); *see also* ELIZABETH J. CLAPP, MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA 2 (1998) (noting role that females played in social reforms).

32. *See* CLAPP, *supra* note 31, at 3, 133–36 (noting recognized need for reform and early developments of juvenile court movement); *see also* WATKINS, *supra* note 2, at 17–23 (discussing general idea of *parens patriae*).

33. *See* WATKINS, *supra* note 2, at 9 (noting adoption of English *parens patriae* idea by American court system). *Parens patriae* is defined by Black's Law Dictionary as "[t]he state regarded as sovereign; the state in its capacity as provider of protec-

Under the theory of *parens patriae*, the Progressive movement introduced a number of changes to the criminal justice system that focused on highly flexible and informal policies of rehabilitation for juveniles.[34] The new juvenile legal reforms had an informal air—judges were not simply there to punish, but to be a child's helpful friend.[35] Reforms included separating children from adults in prison, specially tailored treatment for children, limiting public access to juvenile proceedings, adjudicating a child "delinquent" instead of "guilty" and trying children at informal proceedings without a jury.[36] In fact, these informal proceedings were not thought of as criminal, but rather civil proceedings that did not require the full constitutional protections required in parallel criminal proceedings.[37] Thus, as the juvenile justice system matured in the 1900s, it developed with the distinct notion of doing what was in the "best interest of the child."[38]

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tion to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

34. *See* WATKINS, *supra* note 2, at 17–19 (examining prehistory of juvenile courts under English doctrine of *parens patriae*). The concept of *parens patriae* led to new policies of transfer and new rehabilitation processes. *See id.* at 19–24 (explaining transformation of ideology into legal reforms).

35. *See* CLAPP, *supra* note 31, at 19 (retelling story of first day of juvenile court in Chicago).

36. *See* PLATT, *supra* note 25, at 137 (listing development of new procedures unique to juvenile justice system); WATKINS, *supra* note 2, at 31, 46–50 (examining new theories and procedures); *see also* REPORT, *supra* note 12, at 85–89 (noting general historical changes).

37. *See In re* Gault, 387 U.S. 1, 17–18 (1967) (discussing procedural development of juvenile justice system and its unique place in judicial system). In challenging the traditional juvenile justice system, the Court noted, "proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty." *Id.* at 17.

38. *See* Feld, *supra* note 25, at 477 (explaining vision of ideal juvenile court as providing individualized treatment for offenders to best serve their needs). Experts hoped that courts would be able to tailor care for each youth based on evaluations of each child's personality. *See id.* (explaining hope that system would fit children's needs on case-by-case basis). Reformers of the juvenile justice system hoped to "personalize" justice for children so that judges were fully informed before a child appeared in court for adjudication. *See* PLATT, *supra* note 25, at 142–44 (describing judicial relationship to juvenile offender and flexibility of juvenile justice system). As one judge in an early Indianapolis court said of personalized justice, "it is the personal touch that does it . . . . [I]f I could get close enough to [the juvenile offender] to put my hand on his head and shoulder, or my arm around him, in nearly every case I could get his confidence." *See id.* at 143 n.21 (citation omitted); *see also* Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 412–13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter CHANGING BORDERS] (discussing modern problems accompanying notion of "best interest").

Flowing from the Progressives' reforms, the first juvenile court opened in 1899 with an emphasis on informal proceedings.[39] Within ten years of the first juvenile court opening, twenty-two other states developed juvenile legal systems separate from the criminal system.[40] By 1920, almost every state had some type of separate juvenile justice system in place.[41]

As the juvenile court system developed in a unique manner, the procedural formalities of the criminal courtroom faded.[42] The juvenile justice system's rejection of traditional standards of jurisprudence encouraged judges to use non-legal resources, such as background reports from social workers and mental health evaluations performed by psychologists, when making their determinations.[43] The informal nature of the proceedings also granted broad latitude to judges and imposed few set guidelines in the decision-making process, including the process for discretionary judicial waiver to criminal court.[44]

The power to waive juvenile proceedings to criminal court was available from the inception of the juvenile justice system.[45] Even at the early stages of its development, however, juvenile waiver proceedings were plagued with problems because no uniform standard was in place to determine when a child should face charges as an adult in criminal court.[46] Without formal guidelines and criteria to make these determinations,

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39. *See* CLAPP, *supra* note 31, at 19–21 (describing Chicago court and influence local women's club had on reforms).

40. *See id.* at 133 (noting increase in juvenile-specific laws and courts).

41. *See id.* (noting widespread impact of Progressive movement's reforms).

42. *See* PLATT, *supra* note 25, at 143–45 (explaining that ideal juvenile court setting for Progressives should not resemble traditional criminal courthouse). In addition to the proceedings being less formal, the actual juvenile courtroom's atmosphere was more like a living room rather than a criminal courtroom. *See id.* at 143–44 (explaining that ideal juvenile courthouse should look "more like a parlor or study than an official courtroom"). The juvenile judges hoped that this more relaxed environment would elicit trust and respect from the offender before them. *See id.* at 144–45 (describing juvenile judges' attitudes towards courtroom).

43. *See id.* at 141–45 (describing informal methodology that juvenile court judges were supposed to embrace when handling juvenile cases); Feld, *supra* note 25, at 476–78 (identifying how juveniles began to receive special treatment that was outside realm of traditional criminal justice).

44. *See* Feld, *supra* note 25, at 477 (stating that "an extremely wide frame of relevance and an absence of controlling rules or norms characterized this type of decision-making"). *See generally* David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* CHANGING BORDERS, *supra* note 38, at 13 (discussing history of juvenile transfer).

45. *See* Tanenhaus, *supra* note 44, at 21, 23–25 (noting how judges initially "passively" transferred juveniles by failing to do anything to keep youth in juvenile jurisdictional power).

46. *See id.* at 24 (noting that lack of uniform standards and extreme judicial discretion created system in which juveniles were treated differently from jurisdiction to jurisdiction).

juveniles were subject to the whim of their "friend," the judge, throughout the waiver process.[47]

B. *Development of the Modern Juvenile Justice System*

Although rehabilitating, not punishing, was at the heart of the juvenile justice movement, the ideology changed.[48] As juvenile proceedings evolved, the results of these relaxed proceedings more closely resembled the punitive outcomes of criminal trials.[49] Despite this fact, many believed that juveniles were not entitled to the constitutional protections of due process provided to adults facing similar charges because juvenile waiver proceedings were civil in nature.[50] Nonetheless, a series of Supreme Court cases focusing on juvenile rights, an issue rarely before the Court, drastically changed the nature of the juvenile justice system.[51]

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47. *See* CLAPP, *supra* note 31, at 19 (providing narrative of juvenile court activities). The first juvenile court judge in Chicago, Judge Tuthill, was advised by several women from the area's Woman's Club about his young defendants' backgrounds. *See id.* (describing courtroom scene in Chicago).

48. *See generally* CHANGING BORDERS, *supra* note 38, at 2–33 (examining in-depth developments of juvenile justice system since its inception).

49. *Cf.* Kent v. United States, 383 U.S. 541, 554 (1966) (noting need for procedural safeguard in hearings "of such tremendous consequences"). The Supreme Court was concerned that during these "civil" proceedings juveniles could face serious criminal sanctions because of the inadequate framework available under the *parens patriae* idea. *See id.* at 554–55 (noting that juvenile proceedings are "civil" in nature, but that does not invite "procedural arbitrariness"). In its opinion, the Court expressed concern over the current state of juvenile proceedings when it noted, "[i]t is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner." *Id.* at 554.

50. *See generally* Barbara Bennett Woodhouse, *Children's Rights*, *in* HANDBOOK OF YOUTH AND JUSTICE 377–88 (Susan O. White ed., 2001) (discussing development of children's rights).

In *Kent*, the Court addressed the assertion that lower courts based their juvenile decisions on the idea that in "civil" waiver proceedings, juveniles could not claim deprivation of criminal due process rights because they were not being tried as criminals. *See Kent*, 383 U.S. at 555 (discussing theories relied on by lower courts in juvenile proceedings to justify denial of criminal due process protections). The Supreme Court later clarified that juvenile defendants have certain constitutional protections, but the Court held that these protections were not as extensive as those afforded to adult criminal defendants. *See, e.g.*, *In re* Gault, 387 U.S. 1, 30 (1967) (explaining that juveniles are not entitled to all protections afforded in criminal proceedings).

51. *See generally* Schall v. Martin, 467 U.S. 253 (1984) (holding that detention of juveniles is allowed under certain circumstances); Breed v. Jones, 421 U.S. 519 (1975) (holding that waiver of juvenile to criminal court following adjudication in juvenile court constitutes double jeopardy); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that jury trials are not constitutionally required in juvenile proceedings); *In re* Winship, 397 U.S. 358 (1970) (holding that state must prove delinquency beyond reasonable doubt); *In re Gault*, 387 U.S. 1 (holding that in hearings potentially resulting in confinement, juveniles have basic constitutional rights); *Kent*, 383 U.S. at 562 (holding that juveniles are entitled to "essentials of due process" when facing transfer); *see also* REPORT, *supra* note 12, at 90–91 (describing series of important Supreme Court cases relating to juveniles).

1. *Supreme Court Refinements of the Juvenile Justice System*

a. The Birth of Juvenile Due Process: *Kent v. United States*

In *Kent v. United States*,[52] the United States Supreme Court held, for the first time, that juveniles were entitled to the "essentials of due process."[53] Morris Kent, a sixteen-year-old boy, confessed to breaking and entering, robbery and rape.[54] Kent's mother retained counsel for her son, who subsequently disclosed the possibility that Kent could be tried as an adult.[55] Kent's attorney filed a motion for a hearing on the waiver of jurisdiction.[56] Without ruling on the merits of the motion, the judge determined a "full investigation" had been completed and waived jurisdiction over Kent's case.[57] None of the judge's findings or reasons for waiving jurisdiction was given.[58] After the waiver, Kent was sentenced as an adult in criminal court to serve five to fifteen years on each count, for a total prison term of thirty to ninety years.[59]

On review, the Supreme Court addressed the notion of *parens patriae*, calling into question a juvenile judge's once unlimited power.[60] In its dis-

52. 383 U.S. 541 (1966).

53. *See id.* at 562 (holding that essentials of due process are required when transferring juveniles to criminal system). These rights include the opportunity to have a hearing, access to social records, probation reports and a statement assessing the reasons for transfer to the criminal system. *See id.* at 561–63 (explaining "essentials of due process"). The Court elaborated, however, that the hearings do not have to meet all the requirements of a traditional criminal trial or administrative hearing. *See id.* (acknowledging that juvenile proceedings are distinct from criminal ones). Therefore, although the Court made a strong statement that the rights of juveniles are indeed protected, it maintained the difference between the criminal system and juvenile justice system. *See id.* (noting procedural differences); *see also* Feld, *supra* note 25, at 478–94 (discussing impact of Supreme Court's decisions).

54. *See Kent*, 383 U.S. at 543 (describing facts of case).

55. *See id.* at 544–45 (outlining case chronology).

56. *See id.* at 545–46 (elaborating on counsel's motions for waiver hearing and evidentiary admission of information pertaining to Kent's mental health for purposes of transfer).

57. *See id.* at 546 (noting that ruling made by juvenile court judge was provided without rationale for decision). When pondering how the juvenile court judge made his decision and in examining the waiver, the Supreme Court said, "He made no findings. He did not receive any reason for the waiver. He made no reference to the motions filed by petitioner's counsel." *Id.*

58. *See id.* at 546–47 (postulating that district court judge must have considered evidence even though record had no information showing judge had considered evidence).

59. *See id.* at 550 (reporting outcome of criminal court trial).

60. *See id.* at 551–52, 555–56 (criticizing *parens patriae*). In holding that basic constitutional protections should be provided to juveniles, the Court stated:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques

cussion, the Court recognized some of the problems inherent in the juvenile justice system, including the "considerable latitude" judges have in determining whether to retain jurisdiction over a juvenile's case.[61] Writing for the Court, Justice Fortas stated that the discretion "does not confer upon the Juvenile Court a license for arbitrary procedure."[62] Criticizing the *parens patriae* theory, Justice Fortas wrote that a juvenile could "receive[ ] the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[63] Consequently, the Court held that juveniles facing waiver to the criminal system were entitled to a hearing, access to social records, probation reports and a statement by the judge stating the reasons for the waiver.[64]

Kent is also significant because the Court delineated various "determinative factors" that district court judges are supposed to use in discretionary waiver decisions.[65] Initially, the Court's eight factors provided the perception of uniformity in waiver determinations.[66] Ultimately, however, application of the eight factors confused lower courts and resulted in the

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to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation.

Id. at 555–56. Thus, the flexible personalized proceedings that had once been so important to the Progressive reformers of the juvenile justice movement were slowly being worn away by the Supreme Court's decisions focusing on more rigid standards and guidelines. *See, e.g., In re* Gault, 387 U.S. 1, 55 (1967) (expanding constitutional protections afforded to juveniles); *Kent*, 383 U.S. at 555–56 (same). For a discussion of the philosophical background Progressive reformers believed in as well as their ideal juvenile justice system, see *supra* notes 21–47 and accompanying text.

61. *See Kent*, 383 U.S. at 553 (explaining that limited discretion exists in juvenile justice system).

62. *See id.* (discussing how judges must stay within constitutional limits when determining judicial waiver).

63. *Id.* at 556.

64. *See id.* at 561–63 (elaborating factors and requirements that district court judges must evaluate prior to decision to waive juvenile proceeding). The Court pointedly held that "[m]eaningful review requires that the reviewing court should review. It should not be remitted to assumptions." *Id.* at 561.

65. *See id.* at 566–67 (enumerating eight factors judges are to use in determining appropriate jurisdiction). The Supreme Court listed eight factors for general guidance that are loosely mirrored by the current FJDA factors for discretionary waiver. *See id.* (suggesting factors for guidance in district court proceedings). The Court dictated that district court judges should consider: (1) the seriousness of the alleged offense in relation to protecting the community's safety; (2) whether the nature of the alleged offense was aggressive, violent or premeditated; (3) whether the alleged offense was against persons or property; (4) the merits of the complaint; (5) the need to try the entire case in one court; (6) maturity of the charged; (7) record and previous history; and (8) the prospect of rehabilitation. *See id.* at 566–67 (detailing list of waiver factors district court judges are to use).

66. *See* Feld, *supra* note 25, at 491 ("The addition of long lists of supposed substantive standards, such as that appended by the Supreme Court in *Kent*, does not provide objective indicators to guide discretion.").

differential waiver process that exists today.[67] One commentator has also argued that *Kent*'s endorsement of judicial waiver marked the erosion of rehabilitative ideas and began the era of serving youths their "just deserts."[68] Moreover, the introduction of procedural safeguards and "determinative factors" in transfer decisions made the juvenile justice system more akin to its adult criminal counterpart.[69] Thus, the *Kent* decision cut away the traditional theoretical underpinning of the juvenile court system with its criticism of the Progressive movement's notion of *parens patriae* and introduction of a more punitive ideology.[70]

b. Juvenile Due Process Matures: *In re Gault*

A further departure from the Progressives' original vision of the juvenile justice system came in the Supreme Court's 1967 decision in *In re Gault*.[71] Fifteen-year-old Gerald Francis Gault was taken into custody after a neighbor complained that he was making lewd phone calls.[72] Gault's parents were not given notice of his arrest and at the juvenile delinquency hearing Gault did not have counsel, nor was he told of his right to have counsel.[73] The Supreme Court held that certain rights were guaranteed and that "due process of law requires . . . notice which would be deemed constitutionally adequate in a civil or criminal proceeding."[74]

In re Gault affirmed that juveniles are afforded certain basic constitutional due process protections in hearings that could result in commitment to an adult institution.[75] These procedural protections include the right to counsel, sufficient notice, the right to question witnesses and protection against self-incrimination, even if the proceedings were not "criminal" in theory.[76] In fact, the added protections that the Supreme Court defined in *In re Gault* pushed the ideology behind the juvenile justice sys-

67. *See id.* at 491–92 (elaborating on perception of uniformity that was created through *Kent* decision); *see also* Tanenhaus, *supra* note 44, at 32 (citing Feld's interpretation of *Kent*).

68. *See* Tanenhaus, *supra* note 44, at 33 (characterizing *Kent* decision as ideological shift in juvenile justice).

69. *See id.* at 32 (noting turn of juvenile focus towards punishment).

70. *See id.* at 32–33 (noting that *Kent* marked end of *parens patriae* era because of its inclusion of procedural safeguards of due process). The Supreme Court's decision in *Kent* to introduce formalities into a system that once prided itself on flexibility forever altered the development of the juvenile justice system as the line separating the Progressives' rehabilitative ideal and the criminal world's punishment ideal became increasingly blurred. *See id.* (examining significance of *Kent* decision and briefly discussing shifting philosophy post-*Kent*).

71. 387 U.S. 1 (1967).

72. *See id.* at 3–4 (stating facts of case).

73. *See id.* at 33 (examining due process violations in Gault's case).

74. *Id.*

75. *See id.* at 3 (explaining that failure to observe fundamental constitutional protections led to huge problems in juvenile justice system that needed to be remedied).

76. *See id.* (detailing protections afforded to juveniles).

tem closer to punishment and farther from the importance of a child's amenability to rehabilitation.[77] Blurring the once clear distinction between juvenile court and criminal court purposes, the Court stated:

> There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. . . . A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.[78]

2. *Federal Legislative Advances in Juvenile Justice*

Following the states' lead in creating distinct juvenile justice systems, the federal government passed the FJDA in the late 1930s.[79] The FJDA establishes when and how juvenile offenders will be treated in the federal system.[80] The purpose of the FJDA is to transfer youthful offenders to the criminal justice system when deemed in the best interests of the child and society, and retain those juveniles capable of rehabilitation in the juvenile justice system in order to avoid the stigma of being a convicted criminal.[81]

77. *See* Feld, *supra* note 25, at 478–79 (noting that introduction of protection against self-incrimination no longer allowed juvenile proceedings to be classified as "non-criminal"). Furthermore, later transfer and sentencing decisions moved away from the Progressive movement's framework and towards the substantive goals of criminal law. *See id.* at 483 (discussing changes in juvenile justice system from its inception). In only one hundred years, the system had dramatically shifted towards punishment, ironically coming full circle in its understanding of the development of juvenile offenders by reverting to the same ideas that were embraced in the early common law practice of treating juveniles similarly to adults. *See id.* (noting shift towards punishment); *see also* FELD, *supra* note 31, at 290 (pointing out that since *Gault* decision juvenile court has assimilated many qualities of criminal court).

78. *In re Gault*, 387 U.S. at 36. The *Gault* Court's shifting attitude towards the seriousness of juvenile justice proceedings through the introduction of new procedural protections signaled an increasing willingness to characterize the proceedings as punitive. *See id.* at 36–37 (noting that waiver proceedings carry "awesome prospect of incarceration").

79. *See* 18 U.S.C. § 5032 (2004) (noting guidelines for delinquency proceedings in district court and noting guidelines for juvenile waivers).

80. *See id.* (providing statutory language for juvenile treatment in district court). Additional legislative reform came with the passage of the Juvenile Justice and Delinquency Prevention Act (JJDPA), which requires judicial approval before transfer, restricts the offenses for which a juvenile can be tried as an adult and takes away the federal court's unlimited juvenile jurisdictional power. *See* 42 U.S.C. §§ 5601–5668 (2004); *see also* Joseph F. Yeckel, Note, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U.J. URB. & CONTEMP. L. 331, 338–44 (1997) (noting changes in congressional legislation and subsequent effects on juvenile justice).

81. *See, e.g.*, *In re* Sealed Case, 893 F.2d 363, 367 (D.C. Cir. 1990) (stating that FJDA seeks to protect both child's and society's interests). In describing the purpose of the FJDA, the court in *In re Sealed Case* stated, "[t]he Act is premised on the notion that it is in the best interest of both the juvenile and society that juveniles be insulated from the stigma associated with criminal trials, the publicity, the re-

The FJDA permits federal jurisdiction only under specifically enumerated circumstances.[82] Resting on a strong presumption against trying juveniles in the federal system, the FJDA favors state jurisdiction in juvenile matters.[83] The FJDA allows only three instances in which the Attorney General may assert jurisdiction over a juvenile in federal court: (1) the juvenile state court does not have jurisdiction or refuses to assume it; (2) the state does not have the available programs or services; or (3) the crime is a drug offense or violent felony.[84]

Traditionally, the impact of the FJDA has been limited because of jurisdictional deference to state juvenile prosecution.[85] Nevertheless, because the federal and state juvenile justice systems have incorporated the eight subjective "determinative factors" provided in *Kent* into their juvenile waiver statutes, both systems face many of the same problems with interpretation.[86] Furthermore, the problems that federal court judges have when attempting to properly apply the six waiver factors under the FJDA reflect the same difficulties faced by state court judges when interpreting and applying state waiver statutes.[87] Therefore, while the FJDA does not

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tributive atmosphere and threat of criminal incarceration attendant to criminal proceedings." *Id.* at 367–68.

82. *See* 18 U.S.C. § 5032 (elaborating on when it is proper to assert federal jurisdiction over juveniles).

83. *See id.* (enumerating instances when federal jurisdiction may be proper in absence of state asserting jurisdiction).

84. *See id.* (listing three possible areas of federal jurisdiction). The statute states that federal jurisdiction will not be proper unless:

> [A]fter investigation, [the Attorney General] certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act, or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act, section 922(x) or section 924(b), (g), or (h) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

Id. (citations omitted).

85. *See id.* (acknowledging deference to state juvenile jurisdiction); *see also* Ullman, *supra* note 3, at 1349 (noting that states have specialized courts, judges and rehabilitation facilities because state courts receive majority of juvenile cases).

86. *Compare* Kent v. United States, 383 U.S. 541, 566–67 (1966) (listing statutory factor guidelines in federal proceedings), *with* State v. Hartpence, 42 P.3d 1197, 1200–01 (Kan. Ct. App. 2002) (listing statutory factors used in Kansas proceedings).

87. *Cf. Hartpence*, 42 P.3d at 1201–03 (examining Kansas's standard used to determine whether jurisdictional waiver over juvenile case is proper). In *Hartpence*, many of the same issues that regularly arise under the FJDA were addressed, including: the balancing of evidence to determine whether transfer is warranted, the ability of state judges to weigh the evidence as they deem proper and even the consideration of transfer factors similar to those enumerated by the FJDA. *See id.* at 1199–1200 (listing factors used in Kansas transfer decisions).

currently have a massive impact on juveniles, problems with its interpretation highlight the same need to reform waiver factors, which exists in both the state and federal juvenile justice systems.[88]

In addition, the federal role in juvenile prosecution is likely to increase as more crimes become federalized.[89] Even though the statute limits its federal jurisdiction, youth crime and gang violence are within the federal statute's jurisdiction.[90] Currently, Congress has pending legislation to increase punishments for juvenile offenders in gang-related offenses.[91] The legislation would increase the investigatory resources devoted to federal juvenile gang-related crimes and increase the severity of punishment for the related federal offenses.[92] This may result in an increase in the number of juvenile cases brought into the federal criminal justice system.[93] Furthermore, public perceptions of a juvenile crime epi-

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Additionally, one commentator who examined Florida's juvenile laws noted that as the system currently stands, there is a state problem that mirrors the federal juvenile justice problem: the juvenile justice system in Florida does not focus on the treatment and rehabilitation needs of juvenile offenders due to the lack of concrete criteria to apply. *See* Cynthia R. Noon, *"Waiving" Goodbye to Juvenile Defendants, Getting Smart vs. Getting Tough*, 49 U. MIAMI L. REV. 431, 442 (1994) (explaining application of Florida juvenile law in relation to judicial waiver). Furthermore, children in both the state and federal system experience the same problem—how to navigate the ambiguous jurisdictional criteria of the juvenile justice system. *Cf.* 18 U.S.C. § 5032 (listing vague transfer criteria to determine when waiver is appropriate in federal jurisdiction) *with Hartpence*, 42 P.3d at 1200–01 (listing vague transfer criteria to determine when waiver is appropriate in Kansas state jurisdiction).

88. *See, e.g.*, State v. Rodriguez, 71 P.3d 919, 927 (Ariz. Ct. App. 2003) (examining Arizona state juvenile system that juvenile argued was unconstitutional by allowing judge, not jury, to determine whether to try him as adult).

89. *See* THE HERITAGE FOUNDATION, *Overview: Over-Criminalization of Social and Economic Conduct* (Nov. 17, 2004), *at* http://www.overcriminalized.com/index.html (examining increase in federalization of crimes in America); *see also* Robert E. Shepherd, Jr., *Trying Juveniles in Federal Court*, 9 CRIM. JUST. 45, 47 (1994) (noting increased likelihood that juveniles will be prosecuted in federal court under FJDA either as delinquents or because of waiver); Smith, *supra* note 3, at 1437 (pointing out likely increase in federal prosecution of juvenile crimes).

90. *See* 18 U.S.C. § 5032 (permitting federal prosecution of juvenile drug crimes and organized violence).

91. *See* S. 1735, 108th Cong. (2003) (elaborating on purpose of pending legislation to increase focus on juvenile crime leaders). For a discussion of that pending legislation, see *infra* note 92 and accompanying text.

92. *See* S. 1735, 108th Cong. (detailing plan to increase federalization of juvenile crime). The pending legislation's stated purpose is:

> To increase and enhance law enforcement resources committed to investigation and prosecution of violent gangs, to deter and punish violent gang crime, to protect law-abiding citizens and communities from violent criminals, to revise and enhance criminal penalties for violent crimes, to reform and facilitate prosecution of juvenile gang members who commit violent crimes, to expand and improve gang prevention programs, and for other purposes.

Id.

93. *See* Smith, *supra* note 3, at 1437 (noting probable increase of federal prosecution under FJDA).

demic continue to fuel both state and federal government efforts to "crack down" on youth crimes as part of a get-tough-on-crime plan.[94] Therefore, this new legislation coupled with public opinions on juvenile crime may increase the FJDA's importance in upcoming years.[95]

III. THE FEDERAL JUVENILE DELINQUENCY ACT AND DISCRETIONARY JUDICIAL WAIVERS TO CRIMINAL COURT

Transferring juveniles to criminal court is not a new phenomenon.[96] In fact, the ability to waive juveniles into the criminal justice system has been available since the 1920s.[97] Currently, under the FJDA, a juvenile in the federal system may be tried either as an adult or as a juvenile.[98] Specifically, the juvenile offender may be adjudicated in the juvenile justice system, automatically transferred to the criminal justice system, or transferred to the criminal justice system at the discretion of the district court judge using judicial waiver.[99]

The primary mechanism used to transfer a juvenile to criminal court is discretionary judicial waiver.[100] Under judicial waiver, a judge makes

94. *See* REPORT, *supra* note 12, at 85 (noting that public perceptions resulted in new legislation); *see also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *The Scope of Juvenile Violence, available at* http://ojjdp.ncjrs.org/pubs/reform/ch1_a.html (discussing trends in juvenile crime and public's reaction to them) (last visited Nov. 19, 2004).

95. For a further discussion of the increasing importance of the FJDA, see *supra* notes 79–94 and accompanying text.

96. *See* Feld, *supra* note 25, at 478 (noting judicial discretion to waive juveniles to criminal court has always existed).

97. *See* MELISSA SICKMUND ET AL., JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 29 (1997) (noting that waiver has been available since inception of juvenile justice system); *see also* Feld, *supra* note 25, at 478 (same). Additionally, Feld asserts that the waiver of serious cases has silenced criticism that courts were "coddling" criminals. *See* Feld, *supra* note 25, at 478 (noting waiver may be reaction to contemporary criticism).

"Transfer" is a general term that refers to three mechanisms: judicial waiver, statutory exclusion and prosecutorial discretion. *See generally* HOWARD N. SNYDER ET AL., JUVENILE TRANSFERS TO CRIMINAL COURT IN THE 1990'S: LESSONS LEARNED FROM FOUR STUDIES 1–9 (2000) (studying state juvenile justice transfer proceedings). In the transfer process, three different decision-makers are involved in determining whether an individual case will be waived. *See id.* at 1, 4–5. The judge decides during judicial waiver, the legislature determines the statutory exclusion of a mandatory transfer and the prosecution petitions for prosecutorial discretion to waive the case to the criminal system. *See id.* This Note is only concerned with examining juvenile transfer with respect to discretionary judicial waiver in the federal system.

98. *See* 18 U.S.C. § 5032 (2004) (explaining status factors); *see, e.g.*, United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992) (holding that waiver hearings result in adjudication of status only).

99. *See* 18 U.S.C. § 5032 (explaining jurisdictional possibilities for juvenile delinquent under FJDA).

100. *See* REPORT, *supra* note 12, at 103 (noting that judicial waiver among state courts is most common transfer method); *see also* CENTER FOR THE STUDY AND PREVENTION OF VIOLENCE, *Juvenile Waivers in Adult Court, available at* http://www.colo

the decision in the "interest of justice;" this vague term and method of transfer are the focus of this Note.[101] In passing the FJDA, Congress tried to give this formless phrase meaning by delineating six factors to guide judicial waiver decisions.[102] The government must present any existing evidence on each of the six factors, and the district court judge must make a ruling on the record in relation to each of the factors.[103] If the judge fails to make a finding regarding any statutory factor, the case will be remanded for additional findings.[104]

In addition to considering the six statutorily defined factors,[105] judges are supposed to take into account the youth's leadership role in the criminal activity.[106] It is important to note, however, that the decision to waive jurisdiction is solely a status issue and is not indicative of innocence or

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rado.edu/cspv/publications/factsheets/cspv/FS-008.html (last visited Sept. 20, 2004) (discussing some effects that waiver may have on juvenile). The website notes trends in transfer and the physical and mental impact that transfers to the criminal system may have on juveniles. *See id.* (noting impact on juveniles, including increased delays in adjudication, few treatment options and increased assaults).

101. *See* 18 U.S.C. § 5032 (stating that after waiver hearing judge will determine whether there is "substantial federal interest" to exert federal jurisdiction).

102. *See id.* (listing statutory factors to further define what "in the interest of justice" mandates). For a further discussion of the six statutory factors, see *supra* note 7 and accompanying text.

103. *See* 18 U.S.C. § 5032 ("Evidence of the following [six statutory factors] shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice . . . ."); *see also, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1252 (10th Cir. 1999) ("Section 5032 mandates that the district court consider and make findings as to each of the six statutory factors. In addition, the government must present evidence on each factor.").

104. *See, e.g.*, United States v. Romulus, 949 F.2d 713, 716 (4th Cir. 1991) ("The language of section 5032 plainly and expressly requires that the district court make findings in the record with respect to *each* of the factors outlined."). In *Romulus*, the district court failed to make findings regarding two of the statutory factors. *See id.* (noting lack of findings). The Fourth Circuit made no determination as to whether the case ultimately would be judicially waived, but it determined that section 5032 clearly requires findings on each statutory factor. *See id.* at 715–16 (explaining that case may still be waived after findings are made regarding juvenile's intellectual development and availability of rehabilitation programs).

105. *See* 18 U.S.C. § 5032 (listing factors). For a further discussion of the six factors, see *supra* note 7 and accompanying text.

106. *See* 18 U.S.C. § 5032 (explaining consideration of leadership role in crime). The statute states:

> In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms.

Id. This language, coupled with the pending legislation, demonstrates the increased importance the FJDA will have in the near future. For a further discussion of the importance of the pending legislation, see *supra* note 87–95 and accompanying text.

guilt.[107] In theory, the waiver hearing is a civil proceeding to determine proper jurisdiction for the case.[108]

Although the waiver hearing may be a civil proceeding to determine a juvenile's jurisdictional status, the hearing has very tangible results in the criminal justice system.[109] The decision to waive jurisdiction to criminal court has a serious impact on the quality of life a juvenile offender may expect.[110] For example, juveniles who are convicted and sentenced in the criminal system face an increased likelihood of sexual assaults and violent attacks while in prison.[111] They are twice as likely to be beaten by prison staff and twice as likely to be attacked with a weapon while in prison.[112] Additionally, the rehabilitation programs emphasized at the juvenile level are often much weaker at the adult level, where the focus is on punishment rather than rehabilitation.[113] Furthermore, juveniles tried and convicted as adults often receive harsher sentences than adults in the same jurisdiction.[114] Moreover, some of the most significant statistics suggest that juveniles incarcerated in adult facilities were quicker to rescind upon release and also committed more serious crimes than those housed in ju-

107. *See, e.g.*, United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992) (holding that waiver hearings are civil proceedings resulting in adjudication of status only).

108. *See, e.g.*, Kent v. United States, 383 U.S. 541, 554–55 (1966) (noting civil nature of proceedings); *Parker*, 956 F.2d at 171 (noting that proceedings for waiver are in theory civil even though end result may be punishment for juvenile).

109. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Statistics, available at* http://ojjdp.ncjrs.org/ojstatbb/offenders/faqs.asp#1 (compiling various statistics on juvenile offenders) (last visited Feb. 2, 2005).

110. *See* COALITION FOR JUVENILE JUSTICE, *Transfer: Sending Children to Adult Court, at* http://www.juvjustice.org/resources/fs008.html (providing statistics on juveniles who are transferred or waived) (last visited Feb. 2, 2005); *see also* Ullman, *supra*, note 3, at 1345–51 (noting potential ramification of transferring juvenile to criminal system). *See generally* HANS TOCH, LIVING IN PRISON: THE ECOLOGY OF SURVIVAL 185–234 (1992) (examining inmate victimization in prison).

111. *See* COALITION FOR JUVENILE JUSTICE, *supra* note 110 (noting juveniles held in adult facilities are five times more likely to be sexually assaulted than those held in juvenile institutions). Also, the suicide rate of juveniles held in adult facilities is eight times higher than those serving in juvenile detention facilities. *See id.* (noting suicide rate among juveniles in adult prisons).

112. *See* Robert E. Shepherd, Jr., *The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 42 (1995) (noting potential consequences that imprisonment in adult facility may have on juvenile).

113. *See* REPORT, *supra* note 12, at 94–96 (comparing goals of juvenile justice system with goals of criminal justice system). *See generally* Donna Bishop & Charles Frazier, *Consequences of Transfer, in* CHANGING BORDERS, *supra* note 38, at 227 (examining consequences of transfer from juvenile to adult status).

114. *See* REPORT, *supra* note 12, at 178 (noting phenomenon that transferred juveniles often received substantially longer sentences than adults age eighteen and older for same crime). For a murder conviction, transferred juveniles received a maximum sentence that was on average two years and five months longer than the average maximum prison sentences for adults age eighteen or older. *See id.* (comparing mean maximum sentence length for convicted transferred juveniles, adults under age eighteen and adults older than age eighteen).

venile facilities.[115] Therefore, a presumption in favor of trying a minor as a juvenile exists because of the potential ramifications of placing a juvenile in the criminal justice system.[116]

Although judges must make a finding on each of the six factors, they have broad discretion over the weight assigned to each factor.[117] A judge need not weigh each factor equally in the proceedings.[118] Even if only one factor points in favor of waiver and all others do not, the judge may still waive jurisdiction in that case.[119] Consequently, the discretionary nature of the judicial waiver system has created a system in which juveniles are not receiving the same, or in some cases even similar, evaluations from judges.[120]

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115. *See id.* at 182 (analyzing results of study of juveniles who were transferred to criminal court and control group who remained in juvenile justice system).

116. *See* United States v. Nelson, 68 F.3d 583, 588 (2d Cir. 1995) (noting presumption in favor of juvenile adjudication); United States v. A.R., 38 F.3d 699, 706 (3d Cir. 1994) (same). Despite the serious consequences of waiver, the evidentiary burden in waiver hearings is only by a preponderance of the evidence. *See, e.g.*, United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992) (noting evidentiary burden in waiver hearings). The *Parker* court stated:

> [Juvenile charged in the case] further argues that the district court erred in not requiring the government to prove its case for transfer beyond a reasonable doubt. We disagree. A transfer hearing is not a criminal proceeding which results in an adjudication of guilt or innocence, but a civil proceeding which results in an adjudication of status. As such, the government's burden of proof is only a preponderance of the evidence.

Id.

117. *See, e.g.*, United States v. Juvenile Male M.C., 322 F.3d 482, 485–86 (8th Cir. 2002) (explaining that district court may weigh some factors more heavily than others); United States v. A.R., 203 F.3d 955, 961 (6th Cir. 2000) (noting that district court has wide discretion when balancing and weighing factors); United States v. Wellington, 102 F.3d 499, 506 (11th Cir. 1996) (noting freedom of district court judge to weigh six factors as judge deems proper).

118. *See, e.g.*, United States v. Doe, 871 F.2d 1248, 1254–55 (5th Cir. 1989) ("A court is certainly not required to weigh all statutory factors equally.").

119. *See, e.g.*, United States v. M.L., 811 F. Supp. 491, 494 (C.D. Cal. 1992) (holding that court may properly find within its discretionary power that nature of offense outweighed all other statutory factors and warranted waiver).

120. *See* Ullman, *supra* note 3, at 1357–58 (explaining that disparity exists in juvenile justice system so that similarly situated offenders are not receiving similar treatment); *see also* Robert E. Shepherd, Jr., *Challenging Change: Legal Attacks on Juvenile Transfer Reform*, 12 CRIM. JUST. 55, 55–56 (1997) (noting constitutional attacks on state transfer statutes based on alleged violation of equal protection). This reasoning similarly applies at the federal level because juveniles are being transferred for different reasons in this context as well. *See id.* (noting constitutional attacks).

Constitutional attacks against juvenile waiver made on equal protection grounds, however, have had limited success. *See id.* (noting that broad discretion is widely accepted principle in juvenile proceedings). Nevertheless, the Delaware Supreme Court struck down the state's juvenile transfer statute on equal protection grounds. *See* Hughes v. State, 653 A.2d 241, 252 (Del. 1994) (finding equal protection violation based on removal of statutory provision that allowed judicial investigation into factual basis of charged felony). The *Hughes* court stated:

Of the six factors, judges take the greatest liberty interpreting the meaning of "prior delinquency record."[121] The confusion and variation in determining a juvenile's prior record leads to a process in which juveniles receive disparate treatment because judges have wide discretion and each exercises that discretion differently.[122] Indeed, balancing the six factors to determine whether a discretionary waiver is appropriate is an arduous task.[123]

IV. DETERMINING WHAT "PRIOR DELINQUENCY RECORD" INCLUDES AND HOW TO USE IT FOR WAIVER PURPOSES

The vagueness and lack of legislative guidance when interpreting the meaning of "prior delinquency record" under the FJDA has led to a split among the circuits.[124] Some circuits broadly construe the meaning of "prior delinquency record" to include any and all contact a juvenile has had with the police, even if the juvenile was never charged with a crime.[125] Other circuits evaluate this prong by including only evidence of prior adjudicated incidents.[126] The circuit split focuses on the types of past con-

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> Further, under the statute, children unfairly *charged* with committing a felony but convicted of a misdemeanor are accorded disparate treatment from those children charged with a misdemeanor. The former are treated as criminals on the basis of an unproven accusation while the latter are treated as delinquents and receive proceedings in their best interest. Therefore, the distinction is patently arbitrary and bears no rational relationship to a legitimate government interest.

Id.

121. *Compare* United States v. Wilson, 149 F.3d 610, 612–14 (7th Cir. 1998) (interpreting FJDA to allow admission of juvenile's charged and uncharged conduct based on examination of FJDA meaning), *with In re* Sealed Case, 893 F.2d 363, 364 (D.C. Cir. 1990) (interpreting FJDA to deny admission of juvenile's uncharged conduct based on examination of FJDA meaning). *See generally* Smith, *supra* note 3 (addressing meaning of "prior delinquency record" under FJDA and problems associated with term).

122. *Cf.* United States v. T.F.F., 55 F.3d 1118, 1119–20 (6th Cir. 1995) ("The FJDA directs the court to consider and make findings upon the following factors when determining the appropriateness of a transfer . . . . The court, however, is free to determine how much weight to give each factor.").

123. *See, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1252 (10th Cir. 1999) ("The decision to transfer is a grave and often difficult one, and does not lend itself to simple mathematical formulas."); United States v. TLW, 925 F. Supp. 1398, 1404 (C.D. Ill. 1996) ("[S]triking the balance between rehabilitation, protection, and punishment is not easy . . . .").

124. For a further discussion of the circuit split, see *infra* notes 125–64 and accompanying text.

125. *See, e.g.*, *Wilson*, 149 F.3d at 613 (permitting review of arrests that did not result in adjudications when determining whether to waive juvenile to criminal justice system).

126. *See, e.g.*, *In re Sealed Case*, 893 F.3d at 370 (holding uncharged conduct may not be considered under "nature of alleged offense" factor). Although this case dealt specifically with the "nature of the alleged offense" factor, the D.C. Circuit's reasoning also applies when the court determines what evidence should be allowed in the "prior delinquency record" factor. *See id.* at 369 (noting that allega-

tact with law enforcement that should be encompassed under the prior record factor for discretionary judicial waiver to criminal court.[127] Currently, there are different interpretations of "prior delinquency record" throughout the circuits, demonstrating the lack of uniformity in federal judicial waiver decisions.[128]

A. *Broadly Construing the Meaning of "Prior Delinquency Record" to Encompass All Prior Police Contacts*

In 2002, the United States Court of Appeals for the Second Circuit affirmed an earlier judgment, *United States v. Doe*,[129] allowing courts to consider incidents not leading to adjudications as part of a juvenile's "prior delinquency record" when determining whether to waive jurisdiction.[130] Advocates of this view believe that admitting all of a juvenile's prior contacts with police will give courts a more accurate foundation on which to base their ultimate decisions.[131] At the same time, however, cir-

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tions of uncharged conduct will not be corrected at trial despite fact that they may ultimately convince judges to transfer).

127. *See* Camitsch v. Risley, 705 F.2d 351, 353 (9th Cir. 1983) (noting great variations as to what constitutes one's "record"). The court in *Camitsch* discussed that "record" has several meanings. *See id.* ("[W]hen we speak of a witness's or defendant's 'record,' we refer to a set of facts about that person, consisting of each previous arrest, whether the arrest led to conviction, and if so, the sentence imposed and served."). The court points out that this idea of a "record" is different from a case file used in prison, on probation or while on trial. *See id.* (noting difference in meaning of "record"). Nevertheless, "on occasion all three of these cases files may be referred to generally as 'records,' creating confusion." *Id.* The confusion over what constitutes a record in criminal proceedings can similarly result in confusion over a "record" in juvenile proceedings under the FJDA. *See* 18 U.S.C. § 5032 (2004) (delineating six broad waiver factors with one based on prior "record").

128. For a further discussion of the lack of uniformity in the federal system, see *supra* notes 124–26 and *infra* notes 129–64.

129. 74 F. Supp. 2d 310 (S.D.N.Y. 1999).

130. *See* United States v. Remirez, 297 F.3d 185, 192–93 (2d Cir. 2002) (upholding discretionary judicial waiver).

131. *See* Ullman, *supra* note 3, at 1358–64 (advocating use of all prior police contacts in judicial discretionary waiver determinations). In urging courts to adopt this uniform method, Ullman argues that a contextual analysis of the background of each juvenile should be performed. *See id.* at 1359 (recommending that courts adopt broad definition of "prior delinquency record"). This idea, though notable and full of merit, is an unrealistic solution for reforming the system because the federal system would be unable to provide the massive quantities of resources this solution would require. *See generally* Bishop & Frazier, *supra* note 113, at 240 (discussing caseload issues in criminal courts and impact increased discretionary waivers will have). Additionally, by not further refining the factors and simply allowing the district court to consider all contacts, the extremely discretionary nature of the system is not solved, but only renamed. For a further discussion of policy suggestions in reforming the system, see *infra* notes 204–14 and accompanying text.

Furthermore, as in *Doe*, the government made a similar argument for full disclosure of prior contacts in United States v. TLW, 925 F. Supp. 1398, 1403 (C.D. Ill. 1996) (discussing court's consideration of juvenile's record). In its brief, the gov-

cuits that allow evidence of prior police contacts in the waiver hearing generally believe that attorneys should not be able to relitigate the merits of a previous arrest that did not result in adjudication.[132]

In *Doe*, a juvenile faced charges stemming from his alleged involvement in a gang that engaged in repeated acts of violence and narcotics trafficking.[133] With charges ranging from possession with intent to distribute crack cocaine to the most serious charge of murder, John Doe was hardly a naive youth.[134] Nevertheless, the court held that mandatory statutory transfer was not warranted in this case.[135] Ultimately, the court faced the issue of whether to waive the case to criminal court in the "interest of justice."[136] Acknowledging that the Second Circuit had yet to define the proper scope of "prior delinquency record," the court relied primarily on the Seventh Circuit's decision in *United States v. Wilson*[137] to conclude

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ernment addressed several concerns of the court, including the scope of prior record. *See* Appellee's Brief at *5–6, United States v. TLW, 925 F. Supp. 1398 (C.D. Ill. 1996) (No. 97-1190), *available at* 1997 WL 33623543 (summarizing reasons to allow prior contacts). The government stated its case:

> The court expressed some uncertainty, for example, as to whether its consideration of the defendant's "prior delinquency record" was limited solely to formal adjudications of delinquency, or whether the other information available about delinquent behavior described in the juvenile probation office records and related police reports could be considered as well.
>
> On that latter point, the government argued that, if the court limited its inquiry to only actual adjudications in determining the defendant's record of delinquency, and ignored the facts in cases treated with more leniency, it would unnecessarily disregard a great deal of highly relevant information regarding the ultimate issues the court needed to decide. As the government put it, to "ignore the obvious . . . doesn't seem to be either sensible or required under the juvenile statutes."

Id. (citations omitted).

132. *See TLW*, 925 F. Supp. at 1404 ("In other words, the Court should and must consider the entire record, including reasons for dismissal, but it is not appropriate to litigate the merits of a previous arrest at the transfer hearing.").

133. *See Doe*, 74 F. Supp. 2d at 311 (providing background of charges).

134. *See id.* (listing charged offenses).

135. *See id.* at 312–15 (discussing whether mandatory transfer was appropriate in case and ultimately deciding it was not because charged offense occurred subsequent to allegation presently before court).

136. *See id.* at 321 (holding that mandatory transfer was not warranted, but discretionary waiver was appropriate). The court also discussed its dismay at the government's filing of an untimely mandatory transfer motion based on the argument that John Doe had been "previously found guilty." *See id.* at 312 (reprimanding government for taking months to file motion). Concluding that "previously found guilty" related to adjudications, which occurred before the conduct for which the juvenile was presently before the court, the court noted that there was "no guidance from Congress as to the meaning of the term 'previous.'" *See id.* at 313–14 (defining phrase "previously found guilty").

137. 149 F.3d 610 (7th Cir. 1998). Terry Wilson was a sixteen-year-old charged with distributing drugs. *See id.* at 611 (elaborating on facts of case). The court held that it was proper to weigh Wilson's entire record in determining the seriousness of his prior record and that the court was not confined to considering only prior convictions. *See id.* at 613 (stating holding of case). As a result, jurisdic-

that evidence that did not result in adjudication could properly be considered as part of a juvenile's record.[138] Without elaborating on why it reached this result, the court further expanded the scope of the waiver factors to allow district courts to consider evidence of uncharged conduct when analyzing the other discretionary factors.[139]

The *Doe* decision negates the purpose of having separate discretionary factors to guide waiver decisions by enabling judges simply to find some other method to admit evidence.[140] Other circuits, following the reasoning of *Doe* and *Wilson*, also have allowed judges to consider unadjudicated conduct under either the "prior delinquency record" or another factor.[141] These results may be consistent with the initial Progressive ideology of a flexible and individualized juvenile justice system, but they also create problems.[142] Broad, sweeping judicial discretion creates a system in which an individual judge may evaluate past conduct with little guidance.[143] For example, if a juvenile's past crimes had been strictly property related or involved minor behavioral problems, one judge could give these prior offenses relatively little weight, but another could use these past minor incidents as the sole rationale for waiver, claiming escalating delinquency problems.[144] This outcome is permitted because a court need not give each factor the same weight and may make any finding on the record to justify its rationale in waiving jurisdiction.[145] The disparate treatment worsens when coupled with the textual interpretational problem sur-

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tion over Wilson's case was waived to criminal court where he stood trial as an adult. *See id.* at 614 (concluding that because district courts have great discretion in weighing factors for jurisdictional waiver, lower court was correct in transferring Wilson's case).

138. *See Doe*, 74 F. Supp. 2d at 315 n.5 (holding that, based on implicit support from prior holdings, previous arrests may be considered part of juvenile's prior delinquency record).

139. *See id.* (agreeing with other circuits that evidence of behavioral incidents may be admitted under other discretionary factors for waiver).

140. *See, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1253 (10th Cir. 1999) (allowing unadjudicated conduct to be admitted under any factor); United States v. Juvenile LWO, 160 F.3d 1179, 1183–84 (8th Cir. 1998) (excluding unadjudicated conduct under "prior delinquency record," but permitting under other statutory factors). Even though the court admitted uncharged conduct under the other factors, the court in *Juvenile LWO* acknowledged the "highly prejudicial" danger of considering evidence of those alleged assaults for discretionary waiver purposes. *See id.* at 1184 (noting prejudicial danger).

141. *See, e.g., Anthony Y.*, 172 F.3d at 1253 (allowing unadjudicated conduct to be admitted under any factor).

142. *See* Ullman, *supra* note 3, at 1358 (discussing problems resulting from lack of uniformity).

143. For a further discussion of the broad freedom of judicial interpretation that the FJDA currently permits, see *supra* notes 124–42 and *infra* notes 144–47 and accompanying text.

144. *See, e.g.*, United States v. A.R., 203 F.3d 955, 961–62 (6th Cir. 2000) (noting statutory ambiguities).

145. *See id.* at 961 (noting broad discretion in applying weight of factors for waiver).

rounding the vague term "prior delinquency record."[146] A system that allows differential treatment of juveniles with the same "prior record" or with similar background information can hardly result in fair and just adjudications.[147]

B. *Narrowly Construing the Meaning of "Prior Delinquency Record" to Encompass Only Prior Adjudicated Incidents*

Advocates of a narrow reading of "prior delinquency record" argue that if unadjudicated conduct is admissible, a juvenile could be unduly prejudiced in a waiver hearing because a judge may assume waiver is proper based on conduct never before heard or proved in any court.[148] Additionally, these advocates claim that a broad reading of the statute, which allows for the admission of uncharged conduct, violates the fundamentals of due process because of the juvenile's inability to correct inaccuracies possibly contained in the record.[149] Without a finding on the merits of a particular incident before a court of law, the court cannot determine the accuracy of unadjudicated and uncharged incidents.[150] Therefore, a court could not reasonably rely on these events to accurately determine whether waiver to criminal court is truly in the "interest of justice."[151]

In *In re Sealed Case*,[152] the United States Court of Appeals for the District of Columbia Circuit became the first court to hold that narrowly construing a juvenile's prior delinquency record to limit the admissibility of certain evidence was both in the interest of justice and within the meaning of the FJDA.[153] The seventeen-year-old juvenile in that case was arrested and charged with three counts of cocaine distribution.[154] Seeking trans-

146. *Compare Anthony Y.*, 172 F.3d at 1253 (taking broad reading of "prior delinquency record"), *with In re* Sealed Case, 893 F.2d 363, 368 (D.C. Cir. 1990) (taking narrow reading of "prior delinquency record").

147. *See generally* Shepherd, *supra* note 120 (explaining various legal attacks on juvenile waivers).

148. *See* United States v. Juvenile LWO, 160 F.3d 1179, 1183 (8th Cir. 1998) (noting that "allowing a district judge to consider evidence of uncharged crime . . . would violate the juvenile's due process rights").

149. *See id.* (explaining violation of due process argument); *see also In re Sealed Case*, 893 F.2d at 369 (same).

150. *See In re Sealed Case*, 893 F.2d at 369 (recognizing that juveniles are not able to contest and potentially correct uncharged conduct at trial). The uncharged criminal acts, however, may ultimately affect a judge's decision to waive jurisdiction and may cause a due process violation. *See id.* (holding that evidence of other crimes may not be considered under "nature of the alleged offense" without violating due process).

151. *See* 18 U.S.C. § 5032 (2004) ("Criminal prosecution on the basis of the alleged act may be begun by motion to transfer . . . in the appropriate district court . . . if such court finds, after hearing, such transfer would be in the interest of justice.").

152. 893 F.2d 363 (D.C. Cir. 1990).

153. *See id.* at 364 (stating holding of case).

154. *See id.* at 364–65 (discussing facts and procedural history).

fer, the government used the "nature of the alleged offense" factor to introduce evidence of uncharged conduct contained in a police officer's affidavit.[155] Relying heavily on this evidence in his decision, the district court judge waived jurisdiction over the juvenile.[156] On appeal, however, the D.C. Circuit held that the FJDA's plain language and the fundamental principles of due process prohibited the consideration of uncharged conduct in the waiver hearing.[157] The court reasoned that allowing in "all kinds of extrinsic evidence" relating to current and past events would contravene the purpose of the FJDA.[158] Furthermore, the court stated that, "Congress was concerned with limiting the kind of information that comes before a judge at a transfer hearing" and therefore, it was proper to exclude certain types of evidence.[159]

Although the D.C. Circuit never expressly stated that the scope of "prior delinquency record" was limited to adjudicated conduct, its holding in *In re Sealed Case* implicitly stands for that proposition.[160] Discussing the six waiver factors, the court found that only two factors—the nature of the offense and the prior record—relate to actual violations of the law, thereby limiting the types of admissible unadjudicated conduct.[161] Other courts have also held that the "plain language of the term 'the juvenile's prior *delinquency record*' cannot plausibly be interpreted to encompass evidence of *un*recorded acts, nor . . . conduct which has not been adjudicated."[162]

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155. *See id.* at 365 (describing transfer hearing).

156. *See id.* (noting district court's misplaced reliance on uncharged conduct when determining whether discretionary judicial waiver was appropriate).

157. *See id.* at 368 ("The plain language of the phrase, the text surrounding it and principles of due process make clear that Congress did not intend § 5032's 'the nature of the alleged offense' category to encompass evidence of other uncharged crimes.").

158. *See id.* at 368–69 (exploring FJDA's meaning based on plain language of statute and postulating congressional concerns as to limiting types of evidence permitted in hearings).

159. *See id.* (limiting admissible evidence in hearing based on congressional intent and plain language of statute).

160. *See* Smith, *supra* note 3, at 1446 (agreeing that court's holding stands for proposition of limiting scope of "prior record"); *cf. In re Sealed Case*, 893 F.2d at 369 (discussing admissibility of uncharged conduct).

161. *See In re Sealed Case*, 893 F.2d at 369 n.12 (discussing scope of factors for waiver purpose). In examining the FJDA's six factors, the court stated:

> Of course if a juvenile were entitled to rebut the uncharged offenses at the transfer hearing, due process would not be in issue. But since, as shown above, the purpose of the Act is rehabilitation and not punishment, Congress could not have contemplated the hearing to focus on a plethora of uncharged and unproven offenses. Indeed, four of the six categories on which Congress directed a transfer judge to make findings are entirely unrelated to the juvenile's alleged violations of law.

Id.

162. United States v. Juvenile LWO, 160 F.3d 1179, 1183 (8th Cir. 1998).

Nevertheless, some courts taking this position have permitted the admission of unadjudicated incidents under the other statutory factors.[163] By stating a narrow holding and restricting the admission of certain evidence under one factor, but allowing in the very same evidence under the rest of the waiver factors begs the question: Do individual factors even matter in a FJDA waiver hearing?[164]

V. JUSTIFICATION FOR USING A NARROW INTERPRETATION OF "PRIOR DELINQUENCY RECORD" IN DISCRETIONARY JUDICIAL WAIVER HEARINGS

Inconsistencies in federal judicial interpretations of "prior delinquency record" keep mounting as different courts attempt to determine what evidence should be admissible in waiver hearings.[165] Nonetheless, a narrow construction of "prior delinquency record" is the most practical and judicious interpretation for a number of reasons.[166] First, the shift in the primary purpose of the juvenile justice system from rehabilitation to punishment, coupled with the FJDA's plain language supports a narrow reading of prior record.[167] Furthermore, fundamental legal principles

163. *See id.* at 1183–84 (permitting admission of evidence excluded under prior record under other five factors). In discussing the admissibility of evidence of uncharged behavioral problems, the court examined the plain language of each term. *See id.* (discussing FJDA's factors for discretionary judicial waiver). The court stated that:

> With the lack of persuasive legislative history and the elimination of the due process concern, we cannot interpret the language as restrictively as LWO urges. Instead, we hold that section 5032 leaves to the sound discretion of the district court the decision to admit evidence of other incidents and behavior, that may be alleged to be criminal or delinquent, as relevant to "the juvenile's present intellectual development and psychological maturity," "the age and social background of the juvenile," and "the nature of past treatment efforts and the juvenile's response to such efforts." The district court must make a determination that such incidents and behavior are in fact relevant to the statutory factors in the particular case.

Id. at 1183.

164. *See generally* Ullman, *supra* note 3 (advocating contextual approach to discretionary judicial waivers, which would allow excessive amounts of background information into hearings).

165. *See* United States v. Juvenile Male, 336 F.3d 1107, 1111 (9th Cir. 2003) (noting interpretation of meaning of "prior delinquency record" is issue of first impression in circuit). The Ninth Circuit recently noted the current split over the meaning of prior record, but failed to weigh in on the issue because neither the appellate nor district court had a complete juvenile record during the transfer hearing. *See id.* at 1112 (leaving open meaning of prior record until district court first evaluated complete record of juvenile).

166. For a further discussion on the merits of using a narrow statutory interpretation of "prior delinquency record," see *infra* notes 169–203 and accompanying text.

167. For a further discussion of the justification in using a narrow interpretation based on plain language, see *infra* notes 169–81 and accompanying text.

mandate a narrow interpretation as a way to prevent violations of a juvenile's constitutional rights.[168]

A. *Recent Changes in Juvenile Justice Coupled with the Plain Language Suggest a Narrow Interpretation*

During the past decade, the theory behind juvenile justice has moved away from rehabilitation and toward punishment.[169] As punishment becomes the central focus of the juvenile justice system, the notion of uniformity in judicial waiver proceedings becomes increasingly important.[170] Due to the seriousness of punishments and related consequences of facing charges in criminal courts, juveniles moving through the system should be evaluated according to the same factors.[171] Thus, the recent changes in the system coupled with the FJDA's plain language support a narrow interpretation of discretionary waiver factors.[172]

Through the FJDA, Congress sets out specific factors for the district courts to consider when assessing a discretionary waiver.[173] Each of these

168. For a further discussion of fundamental legal principles that support a narrow interpretation, see *infra* notes 184–203 and accompanying text.

169. *See* REPORT, *supra* note 12, at 89 (noting that 1990s saw unprecedented change in state legislation to get tough on juvenile crime). The report discloses that transfer provisions in forty-five states have been remodeled to make the transfer of a juvenile offender to the criminal justice system easier. *See id.* (providing statistical evidence about transfer in states). Additionally, sentencing authority has expanded and confidentiality in the proceedings has contracted. *See id.* (noting modern trends in juvenile justice). The new sentencing trends reflect the idea of imposing a punishment consistent with the seriousness of the crime, which implicitly moves away from the fundamental notion of creating a system that focuses on the rehabilitation of a juvenile offender. *See id.* at 101–08 (examining changes in juvenile justice system).

170. *See* SNYDER ET AL., *supra* note 97, at 6 (addressing assumption that jurisdictional transfer is reserved for most serious juvenile cases is false because rationale that triggers transfer is largely unknown).

171. *See* Smith, *supra* note 3, at 1460 (concluding that resolution of disagreement is increasingly important in federal courts); Ullman, *supra* note 3, at 1340–42 (discussing abolition of separate juvenile justice system). *See generally* Jeffrey A. Butts, *Can We Do Without Juvenile Justice?*, 15 CRIM. JUST. 50 (2000) (evaluating possibility of abolishing juvenile justice system). For a further discussion of the impact that may result from being tried and convicted in the criminal system as opposed to the juvenile justice system, see *supra* notes 109–16 and accompanying text.

172. *See* 18 U.S.C. § 5032 (2004) (delineating six specific factors district court must consider when determining juvenile's status); *see also* United States v. Juvenile LWO, 160 F.3d 1179, 1183 (8th Cir. 1998) (holding narrow interpretation of "prior delinquency record" proper based on statute's plain language); United States v. Jarrett, 133 F.3d 519, 538–39 (7th Cir. 1998) (noting specificity of FJDA's waiver factors). Furthermore, in *Jarrett*, the court narrowly interpreted what comprised a juvenile's record by holding that the government needs only to present prior adjudicated conduct to provide the full record demanded by the FJDA. *See id.* at 537–38 ("We are careful to note . . . that a proffer of records could satisfy § 5032's standard of completeness, yet nevertheless omit data that would have significantly impacted the district court's transfer determination.").

173. *See* 18 U.S.C. § 5032 (listing factors); *see also Jarrett*, 133 F.3d at 539 (noting specific language of FJDA relating to factors for waiver).

factors allows federal judges to consider certain evidence in waiver hearings.[174] Congress drafted the FJDA, however, to exclude some types of conduct from the waiver determination—specifically, unadjudicated incidents.[175] Congress's decision to enumerate six specific factors, and thereby preclude a judicial waiver solely in the "interest of justice," also supports a narrow construction of "prior delinquency record."[176] One court observing congressional concerns as to the types of evidence admitted in discretionary waiver hearings noted, "[t]hat is why it [Congress] went into such detail laying down 'specific criteria by which the court shall assess prospects for rehabilitation.'"[177]

Traditional definitions of a criminal law record also support a narrow interpretation of a juvenile's "prior delinquency record."[178] These traditional definitions refer to "criminal records" as prior convictions.[179] Therefore, one commentator argues that if "delinquency records" are analogized to "criminal records," only adjudications—which are similar to convictions—would be properly considered in a judge's discretionary decision.[180]

Lastly, if Congress intended for federal judges to have total discretion in the hearings, they could have simply drafted the statute to say "in the

174. *See* 18 U.S.C. § 5032 (listing six factors on which judges must make findings).

175. *See Juvenile LWO*, 160 F.3d at 1183 (concluding that Congress would have specified if courts were supposed to consider all prior police contacts through specific statutory language); *In re* Sealed Case, 893 F.2d 363, 368–69 (D.C. Cir. 1990) (noting congressional concern with evidence admissible before judge). In *Juvenile LWO*, the court examined the statute's plain language and noted that, "we believe that plain language of the term 'the juvenile's prior *delinquency record*' cannot plausibly be interpreted to encompass evidence of *un*recorded acts." *Juvenile LWO*, 160 F.3d at 1183.

176. *See Jarrett*, 133 F.3d at 539 (noting that Congress specifically drafted statute "to assign different responsibilities to different actors in the transfer process"). Moreover, Congress elaborated on these factors "in the interest of justice" to compel judges to make findings with specific methods. *See id.* (explaining that FJDA provides instructions from Congress to judges).

177. *In re Sealed Case*, 893 F.2d at 368–69 (quoting S. REP. NO. 93-1011, § 201 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5320).

178. *See* Ullman, *supra* note 3, at 1355 (commenting that based on common law definitions it could be correct to consider only adjudications when determining what comprises record).

179. *See, e.g.*, Camitsch v. Risley, 705 F.2d 351, 353–54 (9th Cir. 1983) (noting different meanings of "record"); *see also* Ullman, *supra* note 3, at 1355 (discussing meaning of "criminal records").

180. *See* Ullman, *supra* note 3, at 1355 (noting general meaning of "criminal record" includes prior convictions). Therefore, because the plain language of the term "prior delinquency record" is unambiguous, turning to the well-established criminal law definitions would provide guidance for the juvenile courts facing this interpretational problem. *See Juvenile LWO*, 160 F.3d at 1183 ("Because we conclude the plain language of the term 'the extent and nature of the juvenile's delinquency record' is unambiguous, we do not inquire further about Congress' intent in using the term.").

interest of justice" without elaborating further.[181] Congress, however, did not leave the FJDA's waiver factors at the "interest of justice."[182] Therefore, in order to stay within the proscribed congressional limitations, judges should consider only prior adjudications, and not all prior police contacts, under "prior delinquency record" when evaluating the appropriateness of a discretionary judicial waiver.[183]

B. *Fundamental Principles of the Justice System Mandate a Narrow Reading of "Prior Delinquency Record"*

Narrowly construing the meaning of FJDA's "prior delinquency record" factor to include only prior adjudications would produce the most uniform, efficient and constitutionally sound method for determining discretionary waivers.[184] Evaluating only those incidents in which a juvenile has been adjudicated a delinquent still allows judges to exercise discretion while balancing the six factors, but also provides a sensible limit to that discretion.[185] In addition, the type of evidence admitted is limited, creating a more streamlined and uniform evaluation process for judges making discretionary waiver decisions.[186] Moreover, courts interpreting the scope of "prior delinquency record" have discussed possible due process violations with the admission of evidence of uncharged conduct.[187] If courts

181. *See Juvenile LWO*, 160 F.3d at 1183 (noting definitional limits of "prior delinquency record" based on statute's language); *Jarrett*, 133 F.3d at 539 (noting importance of specifically delineating six factors for waiver); *In re Sealed Case*, 893 F.2d at 368–69 (holding that Congress did not intend FJDA to include uncharged crimes based on way statute was drafted). The *In re Sealed Case* court determined that a narrow interpretation excluding uncharged conduct was proper based on the plain language and principles of due process. *See In re Sealed Case*, 893 F.2d at 368 (examining merits on both sides of interpretation argument).

182. *See* 18 U.S.C. § 5032 (2004) (enumerating six statutory factors that are to be considered overall "in the interest of justice").

183. For a further discussion of the definition of a criminal "record," see *supra* notes 178–81 and accompanying text.

184. *Cf. In re* Winship, 397 U.S. 358, 362–64 (1970) (explaining fundamental principles of American legal system); *In re* Gault, 387 U.S. 1, 21 (1967) (describing constitutional due process requirements for juveniles); Kent v. United States, 383 U.S. 541, 561–62 (1966) (detailing conditions of valid waiver to adult status); Bishop & Frazier, *supra* note 113, at 240 (discussing caseload issues in criminal courts and impact increased discretionary waivers will have). The influx of juvenile cases creates the practical problem of accommodating more individuals and providing more resources in the already overburdened criminal system. *See id.* (questioning ability of criminal court to handle juvenile cases).

185. *See, e.g.*, United States v. Juvenile Male, 40 F.3d 841, 845–46 (6th Cir. 1994) (citing United States v. Hemmer, 729 F.2d 10, 17 (1st Cir. 1984)) (holding that FJDA does not instruct court to weigh one factor more than another because court has discretion to balance factors).

186. *See, e.g.*, Juan Alberto Arteaga, Note, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1082–87 (2002) (discussing protecting procedural rights of juveniles by clearly defining uniform guideline to create better system).

187. *See, e.g., In re* Sealed Case, 893 F.2d 363, 369 (D.C. Cir. 1990) (noting due process arguments under FJDA). Furthermore, at least one commentator has ar-

narrowly interpret the scope of prior record, however, juveniles will be treated in a more uniform manner and the due process violation arguments that are currently circulating may be dispelled.[188]

Furthermore, a narrow interpretation limits admissible evidence in a discretionary waiver hearing to evidence proved only by a higher evidentiary standard.[189] Although the juvenile waiver hearings are civil proceedings, a jurisdictional waiver to criminal court may ultimately result in greater punishment and longer confinement if the individual is found guilty of the charged conduct.[190] Because these hearings can potentially lead to more serious punishment in the criminal system than in the juvenile justice system if the juvenile is convicted of the charges after the waiver, only evidence proved by a higher evidentiary burden, such as the clear and convincing standard, should be admissible.[191] The resulting

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gued that the wide discretion in the application of judicial standards in juvenile proceedings has led to "justice by geography." *See* Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 243–44 (2002) (discussing implications of broad judicial discretion in juvenile courts).

188. *See generally* Smith, *supra* note 3 (criticizing FJDA for lack of uniformity and advocating need for more uniformity); Ullman, *supra* note 3 (same).

189. *Cf. In re Winship*, 397 U.S. at 362–64 (describing evidentiary standard required in criminal matters). Because the juvenile court determined these past adjudicated incidents, certain burdens of proof had to have been met before the child was "adjudicated a delinquent." *See id.* at 365–68 (explaining that, in juvenile criminal proceedings, adjudication of delinquency must be proved beyond reasonable doubt). Therefore, those incidents are properly proved and would not be unfairly prejudicial in the waiver hearing. *Cf. id.* at 363 (explaining burdens of proof for findings of guilt). The same cannot be said of unadjudicated incidents because those incidents have not been proved to show guilt beyond a reasonable doubt and therefore may violate due process safeguards. *Cf. id.* at 366–67 (addressing reasons for mandating that juvenile adjudications must be proved beyond reasonable doubt).

> We made clear in that decision [*In re Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

Id. (quoting *In re Gault*, 387 U.S. at 36).

Although they may have a probative value in the waiver process, courts cannot ensure the accuracy of the record if these events are admitted. *But cf.* United States v. Watts, 519 U.S. 148, 149–50 (1997) (allowing evidence of acquitted conduct proved by preponderance of the evidence into *adult* criminal sentencing hearings).

190. *See* Kent v. United States, 383 U.S. 541, 555 (1966) (noting that juvenile proceedings are "'civil' in nature and not criminal").

191. *Cf. In re Gault*, 387 U.S. at 36 (relaying seriousness of juvenile proceedings through potential loss of liberty and drawing parallel to adult criminal proceedings). For a further discussion on the impact that waiver may have on the life of a juvenile, see *supra* notes 109–16 and accompanying text.

framework would be consistent with the parallel constitutional protection afforded to adults facing a similar deprivation of liberty.[192]

Moreover, in the United States, criminal defendants are presumed innocent until proven guilty.[193] Past arrests do not automatically equate to a past violation of the law unless proved beyond a reasonable doubt.[194] Despite that fact, waiver hearings currently do not uphold those two fundamental concepts.[195] Although juveniles are not afforded full constitutional protections, they are guaranteed the essentials.[196] The essentials include requiring the prosecution to prove charges beyond a reasonable doubt.[197] If unadjudicated conduct is admitted and used to make waiver determinations, the juvenile is, in essence, being found "guilty" of unproven conduct without the protections of due process.[198] When courts allow evidence of unproven conduct in waiver hearings, courts may deprive juveniles of the basic protections that the Constitution affords criminal defendants.[199]

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192. *See In re Winship*, 397 U.S. at 362–64 (explaining burdens of proof in criminal proceedings and fundamental role of reasonable doubt standard in American criminal justice). *But see Watts*, 519 U.S. at 151–52 (allowing consideration of underlying conduct for which defendant has been acquitted in adult criminal sentencing hearing).

Watts deals with the sentencing of adult offenders who have been properly convicted in criminal proceedings, which is distinguishable from the civil discretionary judicial waiver proceedings at issue in this Note. *See id.* at 155–56 (discussing what acquittal means for criminal charges). The discretionary judicial waiver process is a civil proceeding and juveniles are not facing sentencing at this point in the adjudication process, but rather, are only having the proper status of their case determined. *See* United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992) (explaining that juvenile waiver proceedings are civil proceedings to determine status of individual as either adult or juvenile).

193. *See In re Winship*, 397 U.S. at 363 (noting "bedrock" principle of presumption of innocence).

194. *See id.* at 363–64 (stating that presumption of innocence is important in keeping faith in criminal system by creating confidence that innocent men are not condemned).

195. *See generally* Shepherd, *supra* note 120 (examining different legal attacks, including due process argument, made against juvenile justice system).

196. *See In re Gault*, 387 U.S. at 20 (noting that due process is "primary and indispensable foundation of individual freedom"); Kent v. United States, 383 U.S. 541, 562 (1966) (citing Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959)) (holding that hearing must "measure up to the essentials of due process and fair treatment").

197. *See In re Winship*, 397 U.S. at 362–64 (discussing fundamental beliefs of American criminal justice system and reasons for their existence).

198. *See* Redding, *supra* note 187, at 240–46 (asserting that juvenile adjudications are often less reliable than criminal convictions due to lack of full due process in those proceedings).

199. *See In re Winship*, 397 U.S. at 361 (holding that proof beyond reasonable doubt is required for all elements of charge). "A person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Id.* at 363 (quoting *In re* Winship, 247 N.E. 253, 259 (N.Y. 1970) (Fuld, C.J., dissenting)). Moreover,

Courts that construe "prior delinquency record" to include past arrests and other unadjudicated conduct are disregarding the presumption of innocence that is fundamental in America.[200] If a judge is allowed to consider past incidents that never resulted in adjudications, a juvenile's rights are violated because that child never had the ability to defend against the charges.[201] Even if, as some circuits hold, the waiver proceedings provide an opportunity to correct errors, the damage is done because the stigma of the past conduct may remain in the judge's mind, tainting the ultimate determination of whether to waive jurisdiction.[202] Therefore, Congress must change the current federal system to provide consistency and to make the juvenile justice system focus not only on the individual needs of the child, but also on upholding the Constitution.[203]

VI. POLICY CONSIDERATIONS: THE NEED FOR LEGISLATIVE REFORM TO THE FJDA

Judges disagree on what evidence is admissible in a waiver hearing.[204] Scholars debating the issue are unsure of the definition of "prior delinquency record."[205] Regardless of whether they argue for a broad or narrow definition, these scholars agree that the FJDA's language is vague and

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one scholar has argued that delinquency adjudications are already less reliable than criminal convictions because broad judicial discretion leads to disparate treatment. *See* Redding, *supra* note 187, at 240–51 (elaborating on why juvenile adjudications are not always accurate). Therefore, if the process used to decide whether a juvenile committed a charge in the first place is less reliable than that used in the criminal system, it seems even less fair to allow unproven prior conduct into civil juvenile waiver hearings in which the protections afforded are even less. *Cf. id.* at 243 (noting that juvenile courts have less rigorous evidentiary and procedural standards).

200. *See, e.g.*, United States v. Juvenile LWO, 160 F.3d 1179, 1184 (8th Cir. 1998) (concluding that "it is erroneous for a district court to consider evidence of incidents or behavior for which there has been no charge or a charge but no conviction").

201. *See, e.g.*, *In re* Sealed Case, 893 F.2d 363, 369 (D.C. Cir. 1990) (explaining uncharged conduct will not be challenged at trial, but court will examine conduct for waiver purposes).

202. *See id.* (stating that uncharged conduct "may be what ultimately convinces the judge to transfer the juvenile"). If, however, the information about unproven prior conduct is admitted under another factor, the same problem of tainting the judge's waiver determination will remain. For a further discussion of the problems associated with allowing unproven prior conduct into the waiver hearing in any capacity, see *supra* notes 165–201 and accompanying text.

203. For a further discussion of the basic grants of constitutional protection based on the *Kent* and *Gault* decisions, see *supra* notes 52–78 and accompanying text.

204. *Compare* United States v. Anthony Y., 172 F.3d 1249, 1254 (10th Cir. 1999) (permitting consideration of unadjudicated conduct in waiver hearing), *with In re Sealed Case,* 893 F.2d at 370 (prohibiting admission of uncharged conduct in discretionary waiver hearing).

205. *See* Smith, *supra* note 3, at 1444 (commenting on conflicts about definition of "prior juvenile delinquency record"); Ullman, *supra* note 3, at 1329 (same).

in need of further detailed legislative guidance to make the application of discretionary waiver factors more effective.[206] As one commentator has noted, "[i]f the selection processes within juvenile court for waiver are not both fair and coherently explained, it is the whole of the juvenile court's jurisprudence that is called into question."[207]

Under the current system, some courts have adopted a broad construction of "prior delinquency record," but others have adopted a narrow construction.[208] These varying constructions have led to differential treatment among juveniles facing waiver.[209] A move towards uniformity in the interpretation of the FJDA would reduce the differential treatment faced by juveniles in the federal system.[210] Clearly delineated and defined federal guidelines would allow courts to make a waiver decision in the "interest of justice" by enhancing the court's ability to accurately assess a juvenile's likelihood of rehabilitation.[211] Reformation of the six current waiver factors would also decrease the likelihood of a due process violation in juvenile court because all juveniles entering the federal system would be treated uniformly.[212] The most realistic and practical method to ensure the necessary uniformity in the judicial waiver process is to allow only prior

206. *See* Arteaga, *supra* note 186, at 1082–85 (calling for further legislative guidance in juvenile transfer proceedings to clarify statutory factors); Smith, *supra* note 3, at 1451–60 (urging reformation of current juvenile waiver proceedings to increase effectiveness); Ullman, *supra* note 3, at 1363 (concluding that Congress should reformulate FJDA to include uniform definition that includes all prior police contacts); *see also* Jennifer A. Chin, Note, *Baby-Face Killers: A Cry for Uniform Treatment for Youths Who Murder, From Trial to Sentencing*, 8 J.L. & POL'Y 287, 336 (1999) (suggesting that transfer factors are reformed for minors charged with murder).

207. Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 280 (1991).

208. For a further discussion of broad and narrow constructions courts have adopted, see *supra* notes 124–64 and accompanying text.

209. *See* Arteaga, *supra* note 186, at 1081–85 (calling for uniformity in federal system to decrease disparate treatment in waiver hearings). "[L]egislative guidance should come in the form of a well defined uniform standard . . . . This legislative guidance will also help prevent the disparate treatment of similarly situated juveniles during transfer hearings." *Id.* at 1081.

210. *See id.* at 1081 (suggesting greater guidance for federal waivers through "a list of clearly defined and prioritized factors"); *see also* Zimring & Fagan, *supra* note 38, at 416 (suggesting balancing transfer standards between rule-oriented system and discretionary factors).

211. *See* Arteaga, *supra* note 186, at 1083 (noting that lack of uniform standards increases likelihood of disregarding amenability of juvenile to rehabilitation). "This legislative guidance will minimize the disparate treatment of similarly situated juveniles and the risk that youth amenable to treatment will be transferred." *Id.* at 1088.

212. *See* Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* CHANGING BORDERS, *supra* note 38, at 386 (noting that due process standards for adults may not be adequate in juvenile proceedings). *See generally id.* at 379–404 (discussing developmental perspective and culpability of juvenile offenders).

adjudicated conduct to be admitted for consideration under any of the six factors.[213] By adopting a streamlined, uniform construction, district court judges would still have the individual discretion to waive jurisdiction, but significant variations in the resulting decisions would be eliminated.[214]

VII. CONCLUSION

As Congress increasingly targets youth violence and federalizes more crimes, federal courts will undoubtedly see an increase in the number of discretionary judicial waivers to the criminal justice system.[215] Furthermore, the way in which judges make waiver decisions is of the utmost importance because of the devastating effects a waiver to the criminal system may have on a youth.[216] As the system currently stands, juveniles face a system that could potentially undermine fundamental legal principles because of conflicting interpretations of the FJDA's discretionary judicial waiver factors, specifically "prior delinquency record."[217] Adopting a uniform standard is imperative for evaluating which juvenile cases should be properly waived to the criminal justice system and which should remain in juvenile court.[218] If Congress only enacts harsher new punishments for juvenile offenders without further delineating the factors that judges are to apply in waiver decisions, the future of the federal juvenile justice sys-

213. For a further discussion on why the best method is to admit only prior adjudicated conduct into evidence, rather than all prior police contacts, see *supra* notes 165–203 and accompanying text.

214. *See* Zimring & Fagan, *supra* note 38, at 414–15 (discussing problem of legislative reforms that do not address specific juvenile justice problem). The authors argue that juvenile justice professionals should play a large role in the legislative process by guiding the prospective new legislation. *See id.* at 415 (advocating legislative policy reform with help of outside experts). Currently, legislation responds to the public's perception of a general threat of juvenile violence. *See id.* at 414 (noting that public mood crafts legislative responses to youth violence).

215. For further discussion on increasing federalization of crimes and the rising importance of the FJDA, see *supra* notes 85–95 and accompanying text.

216. *See* Bishop & Frazier, *supra* note 113, at 254–61 (discussing youth offenders in juvenile and criminal court systems). The effects of being a youth in an adult criminal setting influence the juvenile's attitudes, behaviors and post-release perceptions. *See id.* at 254 (providing overview of impact on youth from organizational settings). Furthermore, prison misconduct is most common among younger inmates, and the prison setting reinforces violent behavior in juveniles. *See id.* at 257–58 (noting that prison inmates endorse violence for "survival" while incarcerated). Youths imprisoned with adults often feel less able to handle the predatory environment and are at the greatest risk for physical and sexual assaults. *See id.* at 258–59 (describing victimization of juveniles in criminal justice system).

217. For a further discussion of the circuit split over the meaning of FJDA waiver factor "prior delinquency record" as well as potential problems arising from discrepancies in interpretation, see *supra* notes 124–203 and accompanying text.

218. *See generally* Zimring & Fagan, *supra* note 38, at 407–24 (providing overview of policy lessons and suggestions that may be learned from various juvenile transfer theories, statistics and cases).

tem is bleak.[219] On the other hand, hope remains for juveniles facing a discretionary waiver; congressional reform aimed at refining waiver factors would decrease the broad discretion district court judges hold, therefore, creating a system more in line with the original Progressive philosophy to save those juveniles capable of being saved.[220]

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219. *See id.* at 416 (commenting on need to strike balance between rule-based policy and discretion). The authors note:

> But the choice in transfer policy is not between overbreadth and lawlessness. The right kind of standards for transfer are those that create the necessary conditions for transfer eligibility . . . A rule orientation can provide the *necessary* conditions for transfer to criminal court without generating needless expulsion from juvenile court, but rules cannot provide the *sufficient* conditions for transfer without overbroad transfers as an inevitable result.
>
> If the legislative process is best restricted to generating the necessary conditions for transfer, legislation must delegate the power to decide in individual cases either to judges or prosecutors.

Id.

220. *See* S. 1735, 108th Cong. (2003) (detailing proposed juvenile crime legislation that would increase the federal role in juvenile adjudications). For a further discussion of the Progressive movement ideology, see *supra* notes 21–41 and accompanying text.